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In the Supreme Court of the United States

OCTOBER TERM 1975

G. RAYMOND ARNETT, DIRECTOR, DEPARTMENT OF FISH AND GAME, STATE OF CALIFORNIA, PETITIONER

v.

5 GILL NETS, ETC., AND RAYMOND MATTZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST DISTRICT, DIVISION THREE

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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This memorandum is submitted in response to the Court's order of December 15, 1975, inviting the Solicitor General to express the views of the United States in this case.

STATEMENT

The decision below was rendered on remand from this Court's decision in *Mattz* v. *Arnett*, 412 U.S. 481.

In 1969 a California game warden seized five gill nets owned by Raymond Mattz, a Yurok (Klamath River) Indian, and instituted a forfeiture proceeding in state court on the ground that the nets were contraband under

the Califoria Fish and Game Code. When seized, the nets were being stored some 200 feet from the Klamath River within the Klamath River Indian Reservation.[1] Mattz intervened in the forfeiture proceeding asserting his ownership of the nets, his use of them at his family's traditional fishing location, and the inapplicability of the California Fish and Game Code to his fishing activities within the Reservation. The state trial court held that the Reservation had been abolished and ordered the forfeiture. The state court of appeal affirmed (see *Mattz, supra,* 412 U.S. at 483–485). This Court reversed, holding that the Reservation had not been abolished and that all land within it remained "Indian country" within the meaning of 18 U.S.C. 1151 (412 U.S. at 506). The Court remanded the case for determination of the "questions relating to the existence of Mattz' fishing rights and to the applicability of California law notwithstanding reservation status" (*id.* at 485).

On remand, the state trial court, after an evidentiary hearing (see Pet. App. 12), held that the State may not regulate fishing by Indians on the Klamath River Reservation and ordered the nets returned (see Pet. App. 2). The state court of appeal, in a thorough opinion, affirmed (Pet. App. 1–12). The court held that the creation of a reservation "'for Indian purposes' encompasses the right to hunt and fish on the reservation without further specification" (Pet. App. 8), citing, *inter alia, Menominee Tribe v. United*

[1] The nets were located on land owned by a logging company (Pet. App. 2).

States, 391 U.S. 404, and that "[t]his is particularly clear on the reservation in question which was obviously chosen with reference to the fishing," citing *Mattz, supra,* 412 U.S. at 487 (Pet. App. 8).

The court also rejected the State's contention that the State had acquired jurisdiction to regulate Indian fishing within the Reservation as a consequence of Public Law 280, 67 Stat. 588, 18 U.S.C. 1162 (Pet. App. 4–9). That Act extends to the State of California jurisdiction over offenses committed by Indians within Indian country in the State, but also provides (18 U.S.C. 1162(b)) that nothing therein shall deprive any Indian or Indian tribe of any fishing right "afforded under Federal treaty, agreement, or statute." The court rejected the State's contention that the proviso did not apply to the Klamath River Reservation because the Reservation was established by executive order, noting that the Reservation was "not created by executive order but by statute"—the Act of March 3, 1853, 10 Stat. 226, 238, by which the President was authorized to set aside five reservations "for Indian purposes" (Pet. App. 5–6). The court also rejected the State's contention that the proviso was intended to exclude fishing rights granted by executive order, finding such an interpretation to be unwarranted by the legislative history of the Act (*id.* at 6–8).

Finally, the court rejected, as unsupported by the facts, the State's contention that it had authority to regulate fishing within the Reservation as a necessary conservation measure. The court found "[t]he record

on this argument * * * not persuasive" (Pet. App. 11, see discussion at 11–12).[2]

The Supreme Court of California denied the State's petition for review (Pet. App. 15).

ARGUMENT

In our view the decision below is correct, does not conflict with any decision of this Court or any other court, and presents no issue of general importance requiring review by this Court.

1. The history of the establishment of the Klamath River Indian Reservation by executive orders and congressional Acts as a home for the Yurok Indians and other tribes that lived and fished along the Klamath River, is set forth in detail in *Mattz, supra,* 412 U.S. at 485–494. The California court of appeal correctly held that the creation of the Reservation under these circumstances reserved to the Indians the right to fish on the Reservation without state interference.

There are two sources of this right. First, it stems from the general principle that bars the States from exercising jurisdiction over the activities of Indians within Indian reservations, except where affirmatively authorized by Congress. See *McClanahan* v. *Arizona State Tax Commission,* 411 U.S. 164, 167–173; *Williams* v. *Lee,* 358 U.S. 217; see also *Mescalero Apache Tribe* v. *Jones,* 411 U.S. 145, 147–149; *Alva Fisher* v. *The District Court of the Sixteenth Judicial District of Montana,* No. 75–5366, decided *Per curiam,* March 1, 1976. Second, the special right to hunt and fish free from

[2] The court also rejected the State's contention that it could confiscate the nets because they were on non-Indian land (Pet. App. 9–10).

limitation by state authorities is implicit in the reservation of the land. *Menominee Tribe* v. *United States,* 391 U.S. 404, 406, 412, n. 12. This is particularly clear here, for as the Court noted in *Mattz, supra,* 412 U.S. at 487, the Klamath River site was chosen as a reservation because it was the Indians' historic home and the river "abounded in salmon and other fish."

That executive orders played a prominent role in the creation of the Reservation does not change this result. Regardless of the manner in which a reservation is created the purpose is generally the same: to create a federally-protected refuge for the tribe. Accordingly, in *Arizona* v. *California,* 373 U.S. 546, the Court rejected Arizona's argument that water rights for Indian reservations could only be reserved by treaty and that four executive-order reservations along the lower Colorado River lacked reserved water rights. 373 U.S. at 598. See also *United States* v. *Walker River Irr. Dist.,* 104 F. 2d 334 (C.A. 9).

Nor has the Court drawn distinctions, for purposes of criminal jurisdiction, on the basis of the method of establishing a reservation. The Colville Reservation, which was the subject of the Court's decision in *Seymour* v. *Superintendent,* 368 U.S. 51, holding state criminal law inapplicable to crimes involving Indians anywhere within an Indian reservation, was a reservation established by executive order. See also *Antoine* v. *Washington,* 420 U.S. 194, 205–206.

With respect to fishing rights we see no reason why a reservation validly established by executive order should be treated differently from other reservations.

2. Petitioner's primary contention (Pet. 12–25) is that Public Law 280 granted the State control over Indian fishing on the Klamath River Reservation. Congress, in Public Law 280, granted California "jurisdiction over offenses committed by or against Indians in the areas of Indian country" within the State. 18 U.S.C. 1162. However, the statute continues with the proviso that (18 U.S.C. 1162(b)):

> Nothing in this section shall * * * deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

Petitioner argues that the proviso is inapplicable to Indian fishing on the Klamath River Reservation because the Reservation, and thus any fishing right, was established by executive order rather than "treaty, agreement, or statute." The court of appeal properly rejected this contention (Pet. App. 4–9).

In *Metlakatla Indian Community* v. *Egan*, 369 U.S. 45, 57, this Court interpreted the same proviso as protecting Indian fishing rights established by regulation, despite the absence of the word "regulation" in the proviso. The Court pointed out that the authority to make the regulation was statutory and that "[t]he apparent purpose of the proviso was to preserve *federally granted fishing rights*" (emphasis added), even though created by regulation.

Likewise, the fishing rights enjoyed by the Indians in connection with this Reservation are afforded by statute—the statutes authorizing establishment of the Reservation. As this Court recognized, in *Mattz* the Reservation was set aside by executive order in 1855 or 1891. In either case the executive order was based on previous Acts of Congress—the Acts of March 3, 1853, 10 Stat. 226, 238, and March 3, 1855, 10 Stat. 686, 699, or the Act of April 8, 1864, 13 Stat. 39; see *Mattz, supra,* 412 U.S. at 484, 487–494. See, also, *Donnelly* v. *United States,* 228 U.S. 243, 255–259.

Petitioner suggests (Pet. 17) that rights based on executive order were deliberately not protected in Public Law 280 because Congress set out to safeguard only those rights for which it might owe compensation under the Fifth Amendment, and that under *Sioux Tribe* v. *United States,* 316 U.S. 317, no compensation would be owed for abolishing a reservation created by executive order. There is, however, nothing in the legislative history of the Act stating such a purpose. Moreover, there is no reason why Indians on a reservation established by executive order should have less right of self-government or less protection for their resources from state interference than Indians on other reservations. There is thus no reason to assume that Congress intended to preserve fishing rights on all reservations but those established by executive order.

3. Petitioner's final contentions (Pet. 25–42) are that even if respondent has a fishing right as a result

of the creation of the Reservation, and even if that right has been preserved by Public Law 280, the right is subject to state regulation when exercised on non-Indian owned land, the right may be limited by the State to subsistence fishing, and the right may be regulated by the State in the interest of conservation. We deal with these in turn.

a. Respondent's fishing within the Reservation was at his family's traditional fishing spot on the river (Pet. App. 10), not on private land. The nets were stored on private land, but without objection by the landowner. No issue is presented here regarding the right of an Indian to fish from private land. Cf. *Antoine* v. *Washington,* 420 U.S. 194, 212 (Douglas concurring); see also *United States* v. *Winans,* 198 U.S. 371.

b. Petitioner cites no authority, and we know of none, that would limit an Indian's on-reservation hunting or fishing to subsistence. The purpose of a reservation is not to restrict Indians to a subsistence economy but to encourage them to use the assets at their disposal for their betterment. See *McClanahan, supra,* 411 U.S. at 169–171. Moreover, Indian fishing rights have on several occasions been interpreted by this Court as extending to commercial fishing. *Alaska Pacific Fisheries* v. *United States,* 248 U.S. 78; *Puyallup Tribe* v. *Department of Game,* 391 U.S. 392, 395–396; *Department of Game* v. *Puyallup Tribe,* 414 U.S. 44, 48. The court of appeal thus properly rejected petitioner's contention that the State could prohibit net fishing by respondent as a means of limiting him to subsistence fishing (Pet. App. 8–9).

c. The court of appeal also properly rejected petitioner's contention that it could impose its prohibition of net fishing against respondent as a conservation measure (Pet. App. 11–12). We know of no authority that would permit state regulation of Indian fishing *within* an Indian reservation for conservation purposes. State regulation, where necessary for conservation, has been permitted in regard to the exercise of *off-reservation* Indian hunting and fishing rights. *Puyallup Tribe, supra; Antoine* v. *Washington, supra.* But even in regard to off-reservation rights there must be a factual showing of the necessity for restricting the Indian right rather than restricting the hunting and fishing privileges of others. See *Antoine* v. *Washington, supra,* 420 U.S. at 207. There has been no such showing here (Pet. App. 10–12).[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

MARCH 1976.

[3] The affidavit of Duncan Snell (Pet. App. 25–27), which petitioner filed with the Clerk and which concerns alleged fishing abuses on the Reservation after the decision of the court of appeal, may be relevant to future litigation or administrative action by the tribe or the United States, but it has no bearing on the issue of this case, which is whether the State acted within its authority in seizing respondent's nets in 1969. There is no evidence that respondent's fishing was in any way detrimental to conservation.

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